

# EXHIBIT 5

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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:  
YVES SAINT LAURENT PARFUMS, S.A., : 07-CV-3214 (LBS)  
et al., :  
:  
Plaintiffs, : January 7, 2008  
:  
v. : 500 Pearl Street  
:  
COSTCO WHOLESALE CORPORATION, : New York, New York  
:  
Defendant. :  
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TRANSCRIPT OF CIVIL CAUSE FOR DISCOVERY  
BEFORE THE HONORABLE HENRY B. PITMAN  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiffs: LOUIS SHERMAN EDERER, ESQ.  
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For the Defendant: JAMES WILSON DABNEY, ESQ.  
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1 THE CLERK: Yves Saint Laurent v. Costco. Counsel,  
2 please state your names for the record.

3 MR. EDERER: Louis Ederer and my colleague Matthew  
4 Salzmann, Arnold and Porter for the plaintiffs.

5 MR. VIOLA: Good afternoon, Your Honor. Anthony  
6 Viola from Edwards, Angell, Palmer and Dodge for Quality King  
7 Fragrance.

8 MR. DABNEY: James W. Dabney and Darcy M. Goddard  
9 from Fried Frank for defendant Costco Wholesale Corporation.

10 MS. CORWIN: Melissa Corwin of Somer and Heller on  
11 behalf of defendant J&H Cosmetics. Good afternoon, Your Honor.

12 THE COURT: Good afternoon. There was a number of  
13 discovery disputes that had been raised in correspondence dated  
14 between December 26th and actually there were some additional  
15 letters that were here. In addition, we will talk about the  
16 scheduling of the trial in this matter. I want to try to  
17 address the issues in the order in which they were raised.

18 I think the first issue is -- the first issue that  
19 was raised was Quality King's request for production of certain  
20 samples. Let me take the easy one, the easy aspect of that  
21 first. Is there still a dispute concerning production of the  
22 bottles, the samples of genuine bottles and genuine pumps?

23 MR. VIOLA: Yes, Your Honor.

24 THE COURT: All right. Let me ask Ms. -- I don't  
25 know who's going to address this on plaintiff's side. What's

1 THE COURT: All right. I think those are all the  
2 issues that were raised in the Fried Frank December 27 letter.  
3 Mr. Dabney, have I overlooked anything in your opinion?

4 MR. DABNEY: No, you haven't overlooked a thing.

5 THE COURT: Are there any issues that Yves Saint  
6 Laurent has against Costco?

7 MR. EDERER: Yes, Your Honor.

8 THE COURT: Go ahead.

9 MR. EDERER: We believe this material is before you in  
10 pieces in various letters, but as part of our document  
11 production, the document requests to Costco, we called for  
12 production of documents relating to prior claims of  
13 counterfeiting against Costco which under the case law is  
14 relevant to the issue of intent and we have the case law if  
15 Your Honor wants to see it, but there hasn't been an objection  
16 on that basis. The objection was that we didn't put the word  
17 alleged in front of the word counterfeit. So that we sent a  
18 letter to Ms. Goddard on December 28th which we attached to our  
19 letter to Your Honor on January 2nd and it relates to Document  
20 Request Number 20, and that document request calls for  
21 documents and communications concerning any legal action  
22 commenced or threatened against you, including, without  
23 limitation, cease and desist letters, complaints, settlements,  
24 consent judgments and/or injunctions arising out of your offer  
25 for sale or sale of any counterfeit goods.

1           What Costco has chosen to do is to say that because  
2 we didn't put the word alleged in front of the word counterfeit  
3 at the end of that request therefore they're only going to  
4 produce documents relating to claims that were made against  
5 them, counterfeiting where it was demonstrated that the goods  
6 were, in fact, counterfeit or where Costco conceded that the  
7 goods were counterfeit. Then, of course, their response was  
8 there are no such documents because every time Costco is sued  
9 for counterfeiting it settles and no liability is admitted and  
10 no determination is made but that's not what we asked for.

11           We asked for documents relating to claims that were  
12 made against Costco for counterfeiting arising out of claim --  
13 we talk about cease and desist letters, complaints. Clearly  
14 what we were talking about were actions commenced or threatened  
15 and not actions in which it was proven or demonstrated that the  
16 goods were actually counterfeited. So we have no documents  
17 responsive to that request. We've gone back several times and  
18 asked for -- and clarified the request and asked for the  
19 documents to be produced and they still have not been produced.

20           I believe Ms. Goddard put in a letter to Your Honor  
21 on that issue today if I'm not mistaken reiterating that that  
22 is Costco's interpretation of our request and reiterating that  
23 they have no documents responsive to that request.

24           THE COURT: Mr. Ederer.

25           MR. DABNEY: You mean Mr. Dabney.

1 THE COURT: I'm sorry, Mr. Dabney. I'm sorry. My  
2 apologies.

3 MR. DABNEY: I'm not sure that this issue really is  
4 properly before the Court. If Mr. Ederer has case law which  
5 he's alluded to I would very much like to read it because we  
6 have not been able to find any.

7 What I understand this request is about is they have  
8 asked for documents that go back as far as 1997 asking for  
9 disclosure of any document concerning any allegation or  
10 assertion that Costco has ever been supplied by anybody with  
11 goods alleged to be counterfeit by anyone and regardless of  
12 whether they were, in fact, counterfeit or not or whether there  
13 was any wrongdoing admitted, established, whatever, and I do  
14 not believe under the Federal Rules of Civil Procedure, the  
15 Federal Rules of Evidence that kind of request is reasonably  
16 calculated to lead to discovery of admissible evidence and I  
17 would request, respectfully request an opportunity to brief if,  
18 as Mr. Ederer says, he claims he has case law on this.

19 I don't see how in a case where the only claim this  
20 apparently would be relevant to is this Opium claim whose facts  
21 are completely known. There's no secret about what happened.  
22 There was a small quantity of product that were supplied to by  
23 my co-defendant. Within eight days of being notified that  
24 there was a question about it we pulled it from the shelves and  
25 so forth.

1           To say that in that case and these circumstances we  
2 should have to look for documents in 1997, did somebody assert  
3 that something we sold supplied by somebody else was  
4 counterfeit and there was no determination whether it was or  
5 wasn't, that has no connection necessarily to the personnel or  
6 the events or anything that was happening in 2007 when we  
7 bought these goods, I respectfully submit that that is just a  
8 fishing expedition and --

9           THE COURT: The worst analogy attorneys use. If you  
10 read Hickman v. Taylor the Supreme Court said it's okay to  
11 fish. They did. Read the decision. It's okay to fish. I  
12 used to keep the opinion on the bench but I stopped doing that  
13 but seriously.

14           MR. DABNEY: It seems to me that it's a request that  
15 doesn't purport to be related to any events in this case.

16           THE COURT: Let me ask you this question. Certainly I  
17 think we -- I take it we agree that under Rule 404 one can show  
18 prior similar acts to show knowledge or intent. Agreed?

19           MR. DABNEY: As to a corporation. I'm not sure that  
20 as to a corporation Rule 404 has been so held, Your Honor.

21           THE COURT: Well, if you want to brief the issue I'll  
22 give you a chance to brief the issue just like I'm giving Mr.  
23 Ederer the chance to brief the French blocking statute issue.  
24 It seems to me that it might have some relevance subject to a  
25 temporal limit. If Mr. Ederer or Yves Saint Laurent wants to

1 MR. DABNEY: I do but --

2 THE COURT: That's fine. You can make your motion on  
3 the same schedule that he's making his motion for -- under the  
4 blocking statute by the 18th.

5 MR. DABNEY: I guess I would have thought since it's  
6 the plaintiff moving to compel that they would file their  
7 motion and we would respond to it.

8 THE COURT: It's just going to come back and bite you  
9 on the blocking statute motion then because then they don't go  
10 first on that and you go first on the blocking statute. Which  
11 way do you want it? It should be consistent. Ordinarily the  
12 burden is on the party trying to block discovery. That's why I  
13 thought it was appropriate for Mr. Ederer to take the  
14 initiative on the blocking statute issue and for you to take  
15 the initiative on the application with respect to Request  
16 Number 20.

17 MR. DABNEY: Okay. We'll do it that way.

18 MR. EDERER: Your Honor, we have depositions scheduled  
19 of Costco in the next -- not tomorrow but starting on Wednesday  
20 through the end of the weekend. Among other things we were  
21 going to inquire as to this issue. So I want to know if we're  
22 wasting our time flying to the State of Washington to take  
23 depositions of the very people who have been involved in these  
24 actions over the last so many years and we fully intended to  
25 ask these questions. I have the case of Bamboo Sales v. Ozack



1 Trading, Second Circuit 1995. In finding willful infringement  
2 the Court noted that "Defendants had been sued in a similar  
3 trademark infringement case in the past." I have the case of  
4 GTFM v. Solid Clothing --

5 THE COURT: There's a default in Bamboo v. Ozack. I  
6 have some familiarity with it. . .

7 MR. EDERER: This is my case, GTFM v. Solid Clothing.  
8 Judge Coate held that Solid had been involved in numerous  
9 infringement actions in the past, confirms its bad faith. It  
10 is a 404 issue and it goes to the question of willful  
11 ignorance. It goes to the question of whether you know that  
12 there may be a problem in a particular area such as fragrance  
13 or grain market and did you heed the warning signs and did you  
14 do your homework and did you follow your buying checklist and  
15 all of those things. This is clearly --

16 THE COURT: Let me ask you this. The depositions  
17 you're scheduled to take out in Washington, are they going to  
18 cover other subjects or is this the only subject to be covered?

19 MR. EDERER: No, they're going to cover other  
20 subjects.

21 THE COURT: If that's the case I think what makes  
22 sense is that you should -- you can inquire on these subjects  
23 during the depositions subject to Mr. Dabney's motion. The  
24 relevance of it is still up in the air but rather than run the  
25 risk of having to make a trip to Washington twice it seems to